No. 12624

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Trustee of the Estate of EUGENE C. BRISBANE, Individually, and BRISBANE & COMPANY, a Limited Partnership, Bankrupts,

Appellant,

vs.

CONSOLIDATED LIQUIDATING CORPORATION, *and* UNITED STATES OF AMERICA,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

The Appellees Have Ignored the Distinction in Bankruptcy Between the Partnership and the Individual Entities.

In his opening brief (pp. 13-15) appellant has pointed out that the Bankruptcy Act, and cases decided thereunder, recognize a distinction between the individual entity and the partnership entity. In their Brief, Consolidated (p. 12) and the United States of America (p. 20) seek to avoid the distinction between these entities on the alleged ground that the letter from the General Account-

ing Office [Tr. 62] makes a reference to "Brisbane & Company." This reference merely shows that Mr. Brisbane, an individual, was associated with Brisbane & Company [Tr. 63] and there is nothing in the record that even remotely indicates that Brisbane & Company in any way profited from the activities of Eugene C. Brisbane, an individual; there is nothing in the record that indicates that the contracts performed by the limited partnership (which contracts gave rise to the present proceeding) were improperly performed or that said contracts were involved in any kickbacks, allegedly made by Mr. Brisbane. Indeed, as has been set forth in all the briefs, it was clearly established by the Accounting Department of Consolidated that the charges made on the contracts here in dispute were proper and that the money would be paid if it were not for the alleged fraud of Eugene C. Brisbane, an individual.

This failure to distinguish between the individual and the partnership is critical. One would think, from a reading of the briefs of the appellees herein, that an argument is being made for the payment of moneys to Eugene C. Brisbane, one of the bankrupts in this proceeding. Such is not the case. The appellant merely seeks to recover the amounts for work and labor furnished Consolidated so that these amounts may be distributed to the creditors of the limited partnership.

Consolidated has never presented any evidence upon an alleged claim of fraud against Brisbane & Company, a limited partnership. Toward the end of the argument

before the Referee [Tr. 101] counsel for Consolidated apparently wished to *argue* this point but was content to stand on the record as far as evidence was concerned. If Consolidated has any claim against Eugene C. Brisbane as an individual for fraud, such claim should not be, and would not be, asserted against the limited partnership which admittedly performed the work and to which the amount hereinabove set forth would otherwise be paid.

Accordingly, appellant re-asserts the cases set forth in its opening brief (pp. 18-22) which stand for the proposition that where the alleged adverse claim is merely colorable, summary jurisdiction is vested in the bankruptcy court. The cases cited by Consolidated in its Brief (pp. 6-11) state general propositions of law but are in no way in conflict with the propositions set forth in Appellant's Opening Brief. Indeed, the case of *In re Roman* (C. C. A. 2nd, 1928), 23 F. 2d 556, heavily relied upon by Consolidated (Consolidated's Brief, pp. 6-7), is one where the court found that the adverse claim was not colorable and the latter part of the opinion in that case was devoted to demonstrating the substantiality of the adverse claim.

II.

The Trustee Has Brought No Suit Against the United States.

The present proceedings were instituted by the trustee against Consolidated and not against the United States of America. Nevertheless, the United States sought to inject itself in these proceedings by filing its petition in intervention. The United States is not bound by the rendition of a judgment against Consolidated; the statement in the brief of the United States (p. 5) that an order in this case "would in reality be an order upon the Treasury of the United States" is incorrect. It is axiomatic that the United States could in no way be bound by the determination of the present case so long as it was content to remain outside these proceedings. A mere reading of the United States' petition for leave to intervene [Tr. 19-20] demonstrates that the United States of America thought that it had an interest to be protected in these proceedings and requested leave to intervene. There is no doubt but that the United States has the right and the power to become a part of this litigation if its officers and agents choose to do so and such action was taken in the present case. The money judgment ordered by the referee below was against Consolidated, not the United States.

III.

The Trustee Is Entitled to a Hearing.

The United States apparently contends, in its Brief, that no hearing is necessary in a case of this sort (Brief, pp. 15-17), and cites as support of this proposition authorities dealing with suits against the United States. The bankrupt partnership made its contracts with Consolidated and the trustee is suing that corporation and not the United States. The Federal Government, however, through certain of its agencies, has attempted to prevent the payment of the amount held by Consolidated and thereby deprive the trustee and the creditors of this property.

Throughout the briefs of both appellees there appears to be an assumption that the trustee is entitled to some form of administrative or judicial review. A careful study of these briefs, however, reveals no specific indication where such review would take place. The Anti-Kickback Act itself contains none of the provisions that are normally deemed compatible with due process of law. There is no provision therein for notice to the person whose property is being appropriated. There is no procedure whereby evidence may be presented in an orderly manner or, as far as the bankrupt and trustee were concerned, in any manner whatsoever. Finally, the Act contains no provision for protest or review, either administrative or judicial, nor for the protection of the rights of third parties.

Since it is clear that some form of review is constitutionally required, despite indications to the contrary in the Brief of the United States (pp. 15-17), the question immediately arises, where shall the hearing take place? If appellees are correct in their argument that this is in effect a suit involving property of the United States, there could be no suit in a state court without the consent of the United States. Indeed, there could be no suit anywhere, since there was no contract with the United States and the trustee would, therefore, be unable to bring a suit on a contract. The Administrative Procedure Act avails the trustee nothing since its provisions were not complied with by the United States and the Act itself was passed after the passage of the Anti-Kickback Act; therefore, it is clear that the Anti-Kickback Act did not contemplate the use of the procedure in the Administrative Procedure Act.

No sound reason has been presented why this matter should not be heard before the bankruptcy court, since the alleged adverse claim is purely colorable. As stated in Appellant's Opening Brief, every effort should be made to interpret the Anti-Kickback statute in a manner consonant with constitutional procedures. In his Opening Brief, appellant cited *A. & M. Brand Realty Corp. v. Woods* (U. C. D. C., D. C. 1950), 93 Fed. Supp. 715, as authority for this well established proposition. Even in an emergency the Government cannot, through its agencies, interfere with contract rights without affording some sort of hearing. This was one of the points expressly decided in *Bowles v. Willingham* (1944), 321 U. S. 503, where the Supreme Court of the United States held that a rent order, where issued by the administrator without any hearing to the landlord, must provide for judicial review after the rendition of the

order. The Supreme Court had earlier decided in *Brinkerhoff-Faris Co. v. Hill* (1930), 281 U. S. 673, that:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."[1]

Other than in the bankruptcy court, neither the bankrupt nor its trustee in bankruptcy has ever had an opportunity to present evidence upon the question whether these alleged kickbacks were chargeable to the bankrupt limited partnership. Every other attempt made by the trustee to obtain a hearing on this matter has been blocked by the simple expedient of two letters from governmental agencies. While it is true that of the $26,484.29 owing to the bankrupt estate, the sum of $6,093.47 is "subject to further processing" by the United States Maritime Commission, it is equally well established that the trustee has done everything within his power to obtain a final processing of this claim. No reason has been made to appear in the record and in the briefs filed in this action why the bankruptcy court is not the proper, if not the only, forum in which this matter may be heard.

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[1]See also "The Requirement of Opportunity to Be Heard in the Administrative Process," by Kenneth Culp Davis, 51 Yale Law Journal 1093, in which this entire question is reviewed at length and the author there concludes (51 Yale Law Journal, 1142):

> "The prevailing judicial doctrine is that improper denial of administrative hearings may be remedied by availability of judicial review of sufficient scope, but widespread reliance upon this doctrine is unfortunate. Safeguards at the administrative stage are clearly superior to safeguards by a theoretical right of review which in practice is often illusory."

Conclusion.

Brisbane & Company, a partnership, entered into a contract with Consolidated for the performance of certain work wherein Consolidated contends that it was a prime contractor with the United States (the transcript record appears to be without proof of this latter contention); the partnership performed services valued in excess of $20,000.00; before Consolidated got around to paying this money to the partnership the United States convicted Eugene Brisbane, also a bankrupt, of conspiring with an employee of Consolidated; the conspiracy appeared to consist of an arrangement whereby Brisbane assisted other companies (no evidence that Brisbane & Company was included) in submitting bids to Consolidated and if the contracts were obtained Brisbane, personally, would receive from these companies a portion of the contract price which would be divided with Consolidated's employee. No showing has ever been made that the partnership received any of these moneys. The United States arbitrarily estimated the money Brisbane received and sent two stop letters to Consolidated which the latter interpreted to mean it could not pay the partnership the money owed to it. The trustee qualified after the bankruptcy commenced, made demands upon Consolidated and the United States, but payment was refused.

Query, What could the trustee do to collect over $20,000.00 unequivocally owing to the estate? Until the United States suggested a fraud defense in bankruptcy, Consolidated took the position it would pay except for the two letters written by the United States. The trustee has no contract with the United States, which renders most questionable a suit against the United States in the Court of Claims or the District Court. Consolidated has no ap-

parent *bona fide* claim to the money owed except to quote the two letters from the United States. The Anti-Kick-back Act, apparently passed hurriedly by Congress to block war profiteering, utterly and completely failed to provide even the vestiges of the fundamental requirements of due process of law such as notice to a claimant, provision for an administrative hearing, application to a court or any other method for protecting property rights.

After all, this claim of fraud is against Brisbane, not the partnership; the position of Consolidated and the United States punishes the creditors of the partnership, not Brisbane. Surely a basic function of a bankruptcy court is to marshal the assets of the bankrupt partnership, for the benefit of all creditors; since the United States has shown no direct interest therein and the position of Consolidated is merely that of stakeholder, the District Court below was clearly in error. If the ruling of the Referee, ordering Consolidated to pay, is affirmed, we are certain that Consolidated will be allowed by the United States to charge this payment to its costs under the prime contract; therefore Consolidated cannot show an adverse claim to the money.

The facts, when analyzed, and the applicable law, when applied, require a reversal of the District Court and a restoration of the Referee's order directing Consolidated to pay the Trustee $26,484.29.

Respectfully submitted,

MARTIN GENDEL,

Of Counsel for Appellant, Trustee in Bankruptcy.